

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
BROWNSVILLE DIVISION

STATE OF TEXAS, ET AL

VS.

UNITED STATES OF AMERICA, ET AL

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)
) CIVIL ACTION NO.
) B-14-254
)
)
)

MOTION HEARING

BEFORE THE HONORABLE ANDREW S. HANEN
MARCH 19, 2015

APPEARANCES:

For the Plaintiffs:

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1 THE COURT: All right. Be seated.

2 All right. We're here in B-14-254, Texas versus United
3 States. Who do we have for Texas?

4 MS. COLMENERO: Your Honor, my name is Angela Colmenero.
5 I'm here on behalf of the plaintiff states, and I'm also joined
6 at counsel table by Cam Barker, Eric Hudson, Adam Bitter and
7 counsel for the State of Indiana, Joe Chapelle.

8 THE COURT: All right. Thank you, Ms. Colmenero.
9 And for the government?

10 MS. HARTNETT: Good afternoon, Your Honor. Kathleen
11 Hartnett from the Civil Division, Department of Justice for the
12 federal defendants. And at counsel table with me are Kyle
13 Freeny and Diane Kelleher, also from the Civil Division.

14 THE COURT: All right. Great.

15 All right. Ms. Colmenero, we're here on your motion, so if
16 you will lead off.

17 MS. COLMENERO: Yes, Your Honor.

18 Your Honor, the plaintiff states filed this lawsuit on
19 December 3rd challenging the DHS directive issued on
20 November 20th that sought to legalize the creation of a deferred
21 action program which would have granted lawful presence to
22 4 million unauthorized aliens. The plaintiff states moved with
23 great speed after filing their lawsuit by filing a motion for
24 preliminary injunction the day after their lawsuit was filed and
25 requesting relief as quickly as possible due to the emergency

1 created by defendants' actions.

2 The plaintiffs moved with such speed for one important
3 reason, a desire to preserve the status quo. This is because we
4 knew that once the federal government implemented this new
5 program, it would be virtually impossible to put the toothpaste
6 back in the tube, and the plaintiffs would suffer irreparable
7 injury. Despite the haste with which litigation proceeded and
8 despite assurances from the Department of Justice attorneys that
9 they gave to the plaintiffs and this Court that the status quo
10 would be preserved during the pendency of this litigation, the
11 exact opposite occurred.

12 Defendants instead granted 100,000 individuals three year
13 periods of deferred action status under expanded DACA, a program
14 plaintiffs explicitly challenged in this lawsuit. Defendants
15 did not inform this Court and plaintiffs did not learn of these
16 developments until March 3rd, nearly 15 days after the
17 preliminary injunction had issued.

18 These actions have prejudiced plaintiffs as 100,000
19 individuals received three-year periods of deferred action and
20 three year employment authorization cards.

21 Defendants have moved for early discovery for two reasons.
22 First, defendants' assurances and representations to this Court
23 do not square with their conduct. The need for discovery that
24 the plaintiffs seek relates not -- to us not being sure we can
25 rely on the Department of Justice about what is and what is not

1 currently being done with respect to implementation of programs
2 in the 2014 DHS directive.

3 Second, defendants have moved for additional discovery --
4 I'm sorry, we've moved for additional discovery because
5 plaintiffs need more information focused on the implementation
6 of expanded DACA in order to determine the scope of the remedies
7 that plaintiffs may pursue in this litigation.

8 As I indicated earlier, defendants informed this Court
9 through an advisory that between November 24th and the issuance
10 of this Court's preliminary injunction order on February 16th,
11 that USCIS had granted three year periods of deferred action to
12 100,000 individuals. This was the first time this action had
13 been disclosed to either this Court or the plaintiffs, and
14 plaintiffs were more than surprised by this information.

15 What is even more troubling than just the disclosure at this
16 stage of the proceeding is that defendants insist that their
17 actions were not inconsistent with the terms of the preliminary
18 injunction or the relief requested by plaintiffs in this
19 lawsuit. Indeed, defendants state that they did not understand
20 plaintiffs to be challenging the issuance of three year deferred
21 action benefits to 2012 DACA renewals.

22 Defendants' position is just untenable. While defendants
23 are correct that individuals could be eligible to receive
24 renewals of their deferred action periods under the original
25 DACA program, the length of that deferred action would be

1 limited to two years under the original 2012 DHS directive. But
2 that is not the action that defendants took here. Instead, they
3 relied on the November 2014 DHS directive to issue three year
4 periods of deferred action to over 100,000 individuals, a
5 benefit that would not otherwise exist but for the 2014 memo,
6 and a benefit that was directly challenged by the plaintiff
7 states and later enjoined by this Court as unlawful.

8 The reason plaintiffs are concerned about this information
9 in the advisory is because on three separate occasions,
10 defendants made statements to this Court that directly
11 contradicted the actions they were taking in terms of
12 implementing the expanded DACA program.

13 First, this Court held an initial status conference over the
14 telephone shortly after the lawsuit was filed. Counsel for
15 plaintiffs expressed concern at that time whether the status quo
16 would be preserved between the date of the conference and the
17 date of the preliminary injunction setting.

18 In response to questioning from the Court, counsel for
19 defendants stated that the agencies would not begin accepting
20 applications for deferred action until mid February.

21 Furthermore, counsel for defendants stated that there would
22 not be any decisions on those applications until later and
23 assured the Court that she would not expect anything to happen
24 between now, the time of the December 19 telephone conference,
25 and the date of the hearing. The plaintiffs relied on this

1 initial assurance of nonaction from the defendants to establish
2 the schedule moving forward on the preliminary injunction.

3 Second, defendants also filed a motion for extension of time
4 to file a surreply to plaintiffs' reply in support of the
5 preliminary injunction brief. This was filed on January 14th,
6 2015.

7 In that brief, defendants represented to this Court that
8 USCIS did not intend to entertain requests for deferred action
9 under the challenged policy until February 18th, 2015; and that
10 once again, no decisions would be made on those applications
11 until at least March 4th, 2015.

12 Nowhere in this pleading do defendants openly state that
13 they are implementing a portion of the 2014 DHS directive. And
14 again, defendants' assurances of nonaction were relied upon by
15 this Court and plaintiffs as the case progressed.

16 Finally during the preliminary injunction hearing before
17 this Court on January 15th, the Court questioned defendants
18 regarding -- regarding when the status quo would change, and
19 this was in response to the pending motion for extension of time
20 to file a surreply.

21 Consistent with the prior representations, defendants
22 confirmed that no application for expanded DACA would be
23 accepted until February 18th, and no action would be taken on
24 any of those applications until, once again, March the 4th.

25 Now, defendants have tried to diffuse the significance of

1 their March 3rd advisory and the information contained therein
2 by claiming that their prior assurances to this Court may have
3 led to confusion. But what defendants do not explain is why
4 they made certain representations to the Court that proved not
5 to be true or, at a minimum, less than forthcoming. They also
6 failed to explain why they chose not to inform the Court that
7 the entire time the lawsuit was proceeding, the entire time they
8 were representing and assuring the plaintiffs that nothing was
9 happening, that the Department of Homeland Security and USCIS
10 was granting tens of thousands of three year periods of deferred
11 action benefits over a two-and-a-half month period.

12 Defendants have also suggested that expanded DACA applicants
13 for first time beneficiaries are somehow different than renewals
14 for individuals who were already receiving deferred action under
15 original DACA. This is perhaps why they do not understand the
16 plaintiffs to be challenging this program. But that is a
17 distinction without a difference. This is because applicants
18 for renewals submit the same application as first time
19 applicants. They simply check a different box.

20 As a result, from November 20th until when the preliminary
21 injunction issued, USCIS was receiving renewal applications and
22 they were taking actions on those applications, and plaintiffs
23 believe all of that is contrary to what was conveyed to this
24 Court. Defendants had a duty to the Court and to the plaintiffs
25 to inform them that the entire time this case was moving forward

1 and the preliminary injunction proceeding that they were
2 actively implementing the expanded DACA program and awarding
3 three year periods of deferred action benefits.

4 Defendants also attempt to justify their actions by claiming
5 that the plaintiff states and this Court were somehow on notice
6 that three year deferred action benefits were being handed out.
7 We believe this is also incorrect. Defendants point to a
8 declaration from Donald Neufeld which was included in an
9 appendix filed with their surreply on January 30th. But buried
10 in the Neufeld declaration in a footnote in a 566 page appendix
11 is the following statement.

12 And this statement simply says that pursuant to the
13 November 20th memo issued by Secretary Johnson as of
14 November 24th, 2014, all first time DACA requests and requests
15 for renewals now receive a three year period of deferred action.

16 While this statement is entirely consistent with the
17 language that was contained within the November 20th DHS
18 directive, nowhere in this declaration is there any statement
19 that defendants were actively issuing three year deferred action
20 benefits to expanded DACA beneficiaries. Instead, just days
21 before this motion was filed with the Court and at the PI
22 hearing, defendants said just the exact opposite. This hardly
23 constitute notice to the plaintiff states that 100,000 deferred
24 action benefits would be doled out and the status quo would be
25 changed during the pendency of the proceeding.

1 The plaintiffs states have filed a motion for early
2 discovery in this matter, and we believe it is necessary. The
3 plaintiff states have been irreparably harmed by defendants'
4 actions in at least the following ways.

5 First, the plaintiff states have argued that a preliminary
6 injunction was necessary, and this Court, in its
7 February 16th order, agreed because it is virtually impossible
8 to unscramble the egg or put the toothpaste back into the tube
9 once defendants issue lawful presence documents.

10 Temporary driver's licenses and other state benefits may
11 have been issued to DACA beneficiaries who receive renewals and
12 three year deferred action statuses. At least in Texas, this
13 means that an individual may have received a temporary driver's
14 license for a three year period of time as a result of this
15 renewal of three year deferred action status, and that's because
16 driver's licenses are issued for the length of time in which an
17 individual can lawfully remain in the United States.

18 To the extent that there's -- there's a suggestion that
19 perhaps we could claw back that three year benefit and change
20 that to a two year benefit, that doesn't solve the irreparable
21 harm that the states have suffered. The cost of clawing back
22 driver's licenses only add to the burden of the states and makes
23 it virtually impossible for the states to try to pull that
24 benefit back once it is issued.

25 Second, plaintiffs also argued in the preliminary injunction

1 proceeding that an injunction was necessary because original
2 DACA program set off a humanitarian crisis, and we sought to
3 prevent another one from occurring. The three year deferred
4 action period that was part of expanded DACA was an added
5 incentive to individuals applying for such a benefit. It goes
6 without saying that a three year term of deferred action and
7 work authorization is more valuable than a two year term. The
8 longer term encourages more applicants for DACA and more DACA
9 renewals. This triggers immediate costs to the states that we
10 have asserted in response or in our preliminary injunction
11 motion such as issuing driver's licenses and other benefits to
12 the people who newly apply for or renew those benefits.

13 Third, every instance of the executive issuing more
14 favorable benefits such as expanded DACA or even original DACA
15 increases the perception that immigrating illegally now will
16 yield lawful presence down the road, which as we have
17 established in our briefing to this Court on the preliminary
18 injunction, increases costs to the states.

19 Finally, there is harm that actually happens in the third
20 year under expanded DACA. Although defendants claim that no
21 harm exists because these individuals would have received a two
22 year deferred action renewal under original DACA, this does not
23 mean that everyone would have received this benefit.

24 Individuals still must meet the eligibility requirements, so
25 there is at least some percentage of people who got a third year

1 under expanded DACA who would not have received two year term
2 under original DACA. That third year would lead to a certain
3 percentage to remain in the country during that third year, and
4 the presence of those individuals would impose costs on the
5 states. There would be direct economic costs in the form of
6 licensing, and this would also include the *parens patriae*
7 injuries of our citizen workers and costs from additional social
8 services.

9 So what do plaintiffs seek to accomplish through this
10 motion? Plaintiffs merely seek permission to conduct early
11 discovery in this matter. As this Court is aware, before
12 defendants filed their March 3rd advisory, the parties agreed to
13 stay the meet and confer requirements to develop a schedule for
14 trial on the merits pending resolution of the motion to stay the
15 injunction. As a result, a motion for early discovery and a
16 granting of our motion would allow plaintiffs the opportunity to
17 conduct limited discovery on the issue of the implementation of
18 expanded DACA and the extent of the plaintiffs' representations
19 and prior assurances to this Court that that program would not
20 be implemented during the pendency of this litigation.

21 We want discovery focused on the representations that the
22 attorneys for defendants made to the Court. This type of
23 discovery would help us learn how the states have been injured
24 and help us ensure that the information that we are receiving
25 from the attorneys for defendants is, in fact, reliable.

1 Additionally, we would like discovery on how many three year
2 terms of DACA, the three year expanded deferred action benefits
3 were handed out to the individuals, when those have been issued,
4 and when USCIS received those applications with respect to the
5 November 20th DHS directive. All of this information would
6 enable the plaintiffs to learn more information regarding
7 implementation of expanded DACA and would assist them in
8 determining the scope of any future remedial relief that they
9 may seek from this Court.

10 And with that, Your Honor, the plaintiffs would request that
11 the Court grant their motion for early discovery and allow them
12 to seek this information from defendants.

13 THE COURT: Let me -- let me ask you a question,
14 Ms. Colmenero. Say I grant your request. And let's say what
15 you find out is exactly what you just argued, you know, that
16 okay, they misrepresented the facts to the Court. In that time
17 period that they misrepresented facts to the Court, 100,000
18 people or maybe more -- I mean, I understand why you want to
19 find out how many, but let's say that's all -- let's say it's
20 all true. What then?

21 MS. COLMENERO: Well, Your Honor, defendants need this
22 information in order to better assess what further relief that
23 they may seek from the Court. I believe our concern is really
24 geared more towards the preliminary injunction that this Court
25 issued and ensuring that there has, in fact, been compliance

1 with it and ensuring that everyone is on the same page in terms
2 of what plaintiffs challenged in this lawsuit and what this
3 Court enjoined and ensuring that everyone is complying with the
4 terms of the preliminary injunction order as this case moves
5 forward.

6 THE COURT: The theory being that if they made these
7 representations on three different occasions to the Court and
8 these representations were not true, how do you know they're
9 complying with the injunction?

10 MS. COLMENERO: Exactly. And ensuring reliability from
11 these representations to the Court will impact the relief that
12 we may seek, which may include a motion to modify the
13 preliminary injunction if it is unclear that it applies to
14 certain aspects of the DHS directive. It may include modifying
15 the preliminary injunction to impose reporting duties from the
16 defendants to ensure compliance. Or depending on whether the
17 facts show a concern more than just unreliable information or a
18 breach of the duty of full disclosure, perhaps sanctions.

19 But there are a multitude of issues that we need to learn
20 more about in order to inform the scope of the remedial relief
21 that the plaintiffs may seek in the future from this Court.

22 THE COURT: Okay. All right. Thank you.

23 Ms. Hartnett?

24 MS. HARTNETT: Thank you, Your Honor. On behalf of the
25 government, I would like to first of all apologize for any

1 confusion that our representations created in the case, and we
2 are -- of course stand ready to answer any questions that the
3 Court has or to provide additional information that would be
4 helpful to the Court in understanding what happened here.
5 I'm -- also just wanted to inform the Court that we do intend to
6 submit a written opposition to the plaintiffs' motion for
7 discovery which is due mid next week.

8 I -- you know, happy to answer any specific questions. What
9 I would say is that these were grants of deferred action under
10 the 2012 criteria that existed before the 2014 memorandum came
11 out.

12 THE COURT: Tell me how that is.

13 MS. HARTNETT: Yes, Your Honor.

14 THE COURT: First of all, let me read the first sentence
15 to your advisory. This is what you filed with the Court.
16 "Defendants file this advisory to inform the Court of certain
17 actions that U.S. Citizenship and Immigration Services took
18 pursuant to the November 20th, 2014." That's DAPA.

19 MS. HARTNETT: Your Honor, we -- I completely agree with
20 you and would not dispute that the three year period versus the
21 two year period deferred action, the genesis of that was the
22 2014 memorandum. I think -- I do think that the basis for this
23 confusion, and I do apologize for it on behalf of my client and
24 our team, is that we were -- when we were talking about
25 applications being accepted for expanded DACA, that would be the

1 actual harm that's being alleged in this case of expanding the
2 universe of people who will be eligible to receive deferred
3 action. As the state here said, the case is about 4 million, up
4 to 4 million new people who may be able to receive benefits.
5 That was the harm that we were focused on. Therefore, the dates
6 that we were providing to the Court were when applications would
7 be accepted for that expanded group to join -- to seek deferred
8 action.

9 THE COURT: We talked about that at the hearing. I
10 mean, I -- Ms. Colmenero's predecessor actually misspoke because
11 I asked, "Does this concern DACA at all?" And he initially told
12 me no, and then caught himself and went back and said, "No, this
13 includes the -- the amendments that are contained in the
14 November 20th, 2014 letter."

15 And then I asked, "You mean like the expansion of the
16 years?" And everybody agreed that was it.

17 And then you said, "It's not happening."

18 MS. HARTNETT: Your Honor, I certainly don't want to
19 take issue with your -- I have looked closely at the transcript,
20 and I don't think that the issue of the three year to two year
21 grant came up during that hearing or I would have immediately
22 brought to the Court's attention this issue. Again, I think we
23 were focused on, because the entire crux of the claim of
24 irreparable harm here, was that people were going to start
25 getting DACA and eventually DAPA that didn't get it before.

1 I actually don't take issue with what Ms. Colmenero -- I
2 mean, we don't dispute that the state is challenging the memo in
3 full. And we certainly appreciate the Court's injunction order
4 applies to the memo in full. And if I may, I would explain the
5 reason why this came to our attention and that we promptly
6 brought this to the Court's attention once we realized that we
7 have inadvertently caused confusion. Was -- the Court's
8 injunction order is very clear that it -- it mostly -- obviously
9 the Court's opinion focuses on DAPA. At the end it says DACA as
10 well, to the extent that there are revisions. And your order
11 says clearly "any and all aspects or phases of the expansions,
12 including any and all changes to DACA."

13 In the course of -- that would mean that to the extent that
14 the agency was issuing three year grants rather than two year
15 grants pursuant to the terms of the November memo, that had to
16 cease.

17 THE COURT: And that's what brought it to your
18 attention?

19 MS. HARTNETT: Yes, Your Honor.

20 THE COURT: So you waited three weeks to tell me you
21 were doing it?

22 MS. HARTNETT: Your Honor, I would say this. We also --
23 I think that the state does direct your attention in their
24 filing to a footnote in our -- in our motion for a stay that we
25 filed with this Court, and I'm not -- I'm not sure -- I think

1 that that indicates even by February 23rd, I believe, which was
2 the date of that motion, we were still not focused on this
3 issue. That footnote talked about that there were some cases in
4 the pipeline, people who were trying to apply for 20 -- I'm
5 going to call it 2014 DACA. I'm trying to use clear phrases but
6 also ones that are not too long. But for the people under the
7 new 2014 criteria had been applying before the February 18th
8 deadline. Those were not being processed, accepted or touched
9 by the agency until -- or processed in any way by the agency
10 pending the outcome of this hearing with this Court.

11 On the other hand, they were there. And if the Court had
12 allowed the program to go forward, could have been processed as
13 2014 DACA applications.

14 And so this -- what my point here is, that footnote again on
15 February 23rd indicated to the Court that there were some 2014
16 applications waiting to potentially be acted on, but again did
17 not draw the Court's attention to the fact that there had been
18 these three year grants because I would just represent to the
19 Court -- and this is certainly our -- these were part of the
20 2012 application process which had a different form, was being
21 processed pursuant to the existing infrastructure, and the big
22 change that was going to occur from the perspective of the
23 agency and, frankly, from the perspective of the harms being
24 alleged here, was the roll-out on February 18th of the new
25 application form. There would have been a whole new apparatus

1 in place to accept the expanded class of people.

2 So all I can tell you, Your Honor, is that is -- that is
3 what we were trying to convey to the Court accurately because
4 the Court's opinion, as it noted, said that it would be -- it
5 was unclear from the face of the November 20th memo what exact
6 date expanded DACA, meaning people who met the broader criteria,
7 could apply on. It gave a number of days rather than a date.

8 And so when we were telling the Court the February 18th was
9 the date, not February 20th as it could have been under the
10 timing in the memo, that is the date that we were trying to
11 explain to the Court.

12 THE COURT: Well, and I took that date to heart. I
13 mean, that's why I -- I mean, my injunction came out on the
14 16th. In fact, it came out late the night of the 16th because I
15 was trying to meet the deadline you set.

16 MS. HARTNETT: Yes, Your Honor. And we -- we -- again,
17 without trying to -- we apologize for the confusion because we
18 were focused, as were the plaintiffs, frankly, and as the Court
19 was on the irreparable harm that was being alleged. And the
20 irreparable harm had to do with new people being eligible for
21 those benefits, new people possibly getting driver's licenses.
22 There was no -- and I just think it does -- it is telling,
23 again, without trying to under -- you know, without trying to
24 de-minimize any confusion that we may have caused, that the
25 state did not point out any harm from three year versus two year

1 grants in its preliminary injunction papers. So even assuming,
2 as the state says --

3 THE COURT: That's because like the judge, the state
4 thought it wasn't happening because you and Ms. Freeny told us
5 nothing is happening. I mean, that was the term, "nothing." I
6 said, "So you're telling me nothing is happening?" And you
7 basically said, "Yes, that's what I'm telling you." So like an
8 idiot, I believed that.

9 MS. HARTNETT: Your Honor, certainly we don't think
10 that. And I do -- I would say that what my point was actually
11 about the -- about the -- about the -- the point is that we were
12 focused on when the expanded group of people would be getting
13 eligible to get the benefits.

14 And my point about the irreparable harm in the papers, I
15 think I'm trying to make a point separate from what you're
16 indicating there, which is if there were independent irreparable
17 harm from going from two years to three years, even if the state
18 thought that wasn't currently happening, which again, without
19 trying to dispute whether that was or was not the state's
20 understanding, one would have expected somewhere in the papers
21 to see an explanation of harm from that. And the fact that that
22 wasn't a focus of the harm, it wasn't a focus of the argument,
23 it wasn't a focus of any of our preliminary discussions is why
24 the government was focused on the date new people could apply.
25 And we were trying to provide the best and most accurate

1 information to the Court on that question, and that was
2 accurate. February 18th was the roll-out date. There was a big
3 apparatus in motion, and that was brought to a halt on the
4 morning of February 17th because we take your order extremely
5 seriously.

6 As part of that compliance, it also became clear that the
7 three year to two year -- the grants from two years to three
8 years which were -- flowed from the November 24th memorandum --
9 I don't dispute that -- also had to immediately cease, and that
10 was what was directed throughout the organization.

11 THE COURT: All right. And the state is basically
12 saying -- and you can just tell me now. You don't have to file
13 something. Why do you think she's not entitled to find out:
14 Look, Judge, we've -- we relied on representations before, and
15 those representations turned out not to be true. We want to
16 make sure we can rely on the representations we're getting now.

17 MS. HARTNETT: Your Honor, I would submit at least two
18 things in response. One is we obviously strive to be as candid
19 as possible and provide the Court with all relevant information.
20 It truly became clear to us that there was potential confusion
21 on this point. This was not an area of focus. This is not
22 something that we did not want to answer the Court's questions
23 if it had it. It was simply not the harm we were focused on,
24 which was new people getting it. So I would say this is --
25 there was not any record of unreliable representations here

1 except with respect to this one potential confusion that we
2 brought, promptly brought to the Court's attention when it
3 came -- became evident to us that we may have created confusion.

4 And so I would just say the fact that we filed an advisory
5 to make clear the facts to the Court should not be used as the
6 toehold to have further discovery. And I can tell you myself
7 that I'm happy and the team and our client is happy to provide
8 the Court with information that it would find useful to -- to
9 satisfy itself of that.

10 I think discovery is a separate question and is not the
11 proper course for addressing any concerns that the Court may
12 have.

13 I also would note that when they called and let us know that
14 they were going to be filing their motion, we did attempt to
15 confer with them to figure out if there was certain specific
16 information that they requested that would be useful and stave
17 off a separate discovery issue here in this case, and we did
18 not -- that engagement did not occur. And also the harms that
19 were being set forth here for the first time in this case --
20 first time was on the PowerPoint today about the alleged harm
21 from the three year to two year grant.

22 So again, I think there's a separate -- there's two issues
23 as they've identified. One is can you trust what the government
24 is telling you? And I'm saying to you, Your Honor, with full
25 respect and apologies for the confusion that we have caused that

1 yes, you can. And that we brought this issue to the Court's
2 attention promptly. I think there's --

3 THE COURT: I can trust what you're saying, is what
4 you're saying, yes?

5 MS. HARTNETT: Well, yes. And, Your Honor, I do
6 think --

7 THE COURT: I can trust what Secretary Johnson says?

8 MS. HARTNETT: Your Honor, you can. And I may --

9 THE COURT: I can trust what the president says?

10 MS. HARTNETT: Your Honor, we -- the --

11 THE COURT: That's a yes or no question.

12 MS. HARTNETT: Of course, yes. Yes, Your Honor, of
13 course.

14 THE COURT: Okay.

15 MS. HARTNETT: And we are striving to provide the Court
16 with accurate information. We did not -- the government did not
17 implement the revised DACA as we understood that term meaning,
18 the expansion of this deferred action to potentially 4 million
19 new people before the Court ruled. That was the crux of this
20 case, that was the crux of their focus of harm, and we were
21 doing our best to let the Court know when that would happen so
22 that the Court could, as you've noted, timely rule and prevent
23 that from taking effect if the Court so saw fit.

24 THE COURT: All right. Let me ask you a question
25 because I asked Ms. Colmeneri. And if I mispronounce your name,

1 I apologize. Colmenero. Basically the same question.

2 So let's say everything they say is true. What do you think
3 I ought to do?

4 MS. HARTNETT: Right. To the extent, Your Honor -- I
5 mean, they say a lot of things. I mean, to the extent there was
6 a -- I guess to the point of -- if they were able to
7 establish --

8 THE COURT: Let me -- I'm taking it to the full extreme
9 of what that -- let me -- if I find that the government
10 misrepresented the facts that the states relied on, that the
11 Court relied on it, what should I do? Nothing?

12 MS. HARTNETT: Your Honor, I think I do have an answer
13 for you on that. Thank you for framing the question that way.
14 I think that to the extent the Court believes that it issued its
15 preliminary injunction ruling and that the briefing was --
16 occurred without full information that was relevant to the
17 Court, the proper remedy here would be to do supplemental
18 briefing on the specific issue of should there be additional
19 relief ordered by the Court for the three year grants that
20 occurred during the relevant period.

21 THE COURT: Should I order sanctions?

22 MS. HARTNETT: No, Your Honor, you should not. And I
23 would note that that's not been something that was teed up for
24 this hearing, either in your order, in their motion.

25 THE COURT: She brought it up in her argument.

1 MS. HARTNETT: That's correct, but we would deserve full
2 notice of whatever -- whatever type of relief was being sought
3 there, given the severity of that type of relief. And moreover,
4 I would say there was absolutely no basis for sanctions here.
5 The government was trying to do the right thing by bringing to
6 this Court's attention an important fact that the Court may find
7 important and that we realize may have inadvertently been left
8 out of the presentation of this case.

9 But I think what is -- the key here, though, is that for
10 there to be some additional relief here, and I'm talking about
11 whether something should be done to transform the three year
12 grants into two year grants and consistent with what the
13 government has told this Court, there are options for taking
14 relief to accomplish that because we -- as we told the Court,
15 these grants are revocable. They can be taken back. These are
16 all people that would have had two year grants if they had --

17 THE COURT: My span of options -- my span.

18 MS. HARTNETT: Yes.

19 THE COURT: Not what y'all can do, but what I can do. I
20 mean, I can do nothing on one hand. I can strike your pleadings
21 on the other. I mean --

22 MS. HARTNETT: I think there's a third --

23 THE COURT: I mean, Judge Ellison in Houston in the
24 Tesco Corporation case, I mean, he granted a dismissal with
25 prejudice against a person that had -- or a company that had won

1 a lawsuit.

2 MS. HARTNETT: Your Honor, I think that would be wholly
3 unwarranted here. For example, I -- I think this would be a
4 different situation, for example, if the government had been
5 implementing the expanded class and giving new people access to
6 deferred action during the relevant time period. That did not
7 happen. These are all people that would have received two year
8 grants anyway under the old criteria. I do think --

9 THE COURT: Go ahead, finish.

10 MS. HARTNETT: To be constructive, though, I do think
11 that if there is a true allegation here of harm that the state
12 is facing due to the hundred thousand -- I can -- it's 108,081
13 grants during the relevant time period. If there was a harm
14 that the state is facing from those, the proper course would be
15 for Your Honor to receive briefing on the harm and to issue an
16 order. And if the order were to require some sort of a remedial
17 action on behalf of the government to unwind those three year
18 grants, the government of course would -- would receive that
19 court's order.

20 THE COURT: What about attorney's fees? Should I order
21 attorney's fees?

22 MS. HARTNETT: Your Honor, I would -- we would --

23 THE COURT: I mean, but that's --

24 MS. HARTNETT: No.

25 THE COURT: -- certainly an option. Let me ask you

1 this. If I order attorney's fees, who pays it?

2 MS. HARTNETT: Well, the United States.

3 THE COURT: Well, United States taxpayers pay it, right?

4 MS. HARTNETT: Your Honor, I -- again, I -- we have
5 this --

6 THE COURT: Well, answer my question. The United States
7 taxpayers?

8 MS. HARTNETT: Ultimately, yes.

9 THE COURT: All right. So that means that the states,
10 the people that have already suffered the damage, if there is
11 damage, actually end up paying their own sanctions, right?

12 MS. HARTNETT: In that respect, Your Honor, yes, but --

13 THE COURT: Okay.

14 MS. HARTNETT: Again, I -- we're happy -- these are all
15 issues that are far beyond what is sought in the motion that is
16 at issue today. And, frankly, the government has not had a
17 chance to brief that or even hear what the allegations would be
18 against it.

19 But what I'm telling you is that we do -- we take seriously
20 the notion that if the Court finds there to be a reason for
21 further briefing or further potential relief for the state based
22 on harm that the state could establish from those three year
23 grants, we of course would be welcome to -- willing to do that.

24 But I think -- I don't -- without again minimizing the
25 confusion, there has been no allegation throughout any of the

1 proceedings in this case that the three year grants are some way
2 harmful.

3 THE COURT: Okay. I'm just saying I'm doing this on the
4 assumption she's right.

5 MS. HARTNETT: I'm saying that even if she is right, the
6 question then would be, okay. There was a -- there -- assuming
7 that there was a mistaken information before the Court and that
8 was the fault of the government, what do you do with that? And
9 I'm -- what my point here is I believe that they would have a
10 chance perhaps to show that it was material and that they should
11 get an additional injunction. The other injunction of course is
12 already up before the Court of Appeals, and we would of course
13 be willing to brief that issue for the Court.

14 THE COURT: All right. And what I asked you about if I
15 awarded attorney's fees, the same would be true if I fined
16 somebody or fined the government or if I awarded some kind of
17 damages. I mean, what would happen is the taxpayers would end
18 up having to pay that, correct?

19 MS. HARTNETT: Essentially, Your Honor, yes.

20 THE COURT: All right. So the states would end up
21 having to pay their own damages, the taxpayers of the states,
22 correct?

23 MS. HARTNETT: Yes, Your Honor.

24 THE COURT: All right. Let me switch over on a
25 different topic while I have you.

1 MS. HARTNETT: Yes, Your Honor.

2 THE COURT: Because you have a pending motion in front
3 of the Court, a motion to stay.

4 MS. HARTNETT: Yes, Your Honor.

5 THE COURT: One of the things that was new, and I -- the
6 state has objected to this, but I want to ask you while I have
7 you here about it. There was an affidavit from -- and I will
8 butcher this name too as well -- Kerlikowske?

9 MS. HARTNETT: That's accurate, yes. That's correct.

10 THE COURT: All right. And he's basically laid out, and
11 maybe it's laid out other places, but it's probably in his
12 affidavit the most succinctly, the way that DAPA or DACA, for
13 that matter, helps them.

14 And the -- and what I'm asking you is if -- the way I
15 understood his affidavit is because these individuals will be
16 issued some kind of license or card or ID or something like
17 that, that if a Border Patrol or an ICE agent stops a person,
18 they can show them their card, and they'll know that they don't
19 have to pursue that person. Am I reading his affidavit right?

20 MS. HARTNETT: Yes, Your Honor.

21 THE COURT: Okay. All right. My question is, why
22 aren't you doing that now? I didn't enjoin you from doing that.
23 You could issue them some kind of form that says, "We're not
24 prosecuting this person."

25 MS. HARTNETT: Your Honor, I think the people that

1 receive deferred action receive more than a slip of paper that
2 is their deferred action approval, and they also receive an
3 employment authorization document. I think the employment
4 authorization document is a recognized secure type of ID.

5 THE COURT: My question to you is, you could say we have
6 a bunch of folks here that other than being in the country
7 illegally are fairly law abiding. They -- as Secretary Johnson
8 says in the memo, they may be working, they may be supporting
9 their families. They may be doing all the things that we would
10 hope they would do other than being in the country illegally.

11 There's nothing that's stopping the Department of Homeland
12 Security from saying: All right. We want those people. Come
13 forward. We're going to do a background check on you, and we'll
14 give this card that says for three years we're not prosecuting
15 you. We're not going to -- we've got higher priorities. I
16 mean, y'all could do that right now.

17 MS. HARTNETT: Your Honor, yes. That was not the
18 judgment of how to do the program, but that's an alternative.

19 THE COURT: I know. But, I mean, you could -- if you
20 wanted, even with my injunction in place, you could satisfy all
21 those security needs without issuing legal presence and without
22 giving them tax benefits and employment authorizations and
23 Social Security. I mean, that came up in the news. Can you --
24 are they going to be eligible for Social Security benefits?

25 MS. HARTNETT: Your Honor, under existing law, the

1 people that get deferred action end up having a number that
2 could allow them to later on -- basically account for their
3 income in the meantime to put it on the books.

4 But may I just add to that? Not to get into a -- do more
5 argument than Your Honor would want. I think an incentive for
6 this pro -- the reason why deferred action in the department's
7 judgment works in a way that's different than the prosecutorial
8 discretion is it does provide an incentive for people to come
9 out and identify themselves. The ability to work -- and again,
10 I know -- I understand Your Honor may disagree under existing
11 regulatory and statutory structures, but work authorization is a
12 large incentive for getting people to be able to come out of the
13 shadows, as it said, and to identify themselves.

14 I think that the idea would be to make sure that we're
15 having people identify themselves and have a ability to work
16 legally while they're in that period of deferred action. So
17 that would be a difference from the way Your Honor was proposing
18 it.

19 THE COURT: Well, it would be a difference. But what
20 you're saying is basically we have to -- I mean, just an offer
21 to stay in the country without being prosecuted, we have to give
22 them some extra incentive? I mean, we're basically bribing the
23 people to stay in the -- stay in the country legally?

24 MS. HARTNETT: I'm not saying that, Your Honor. I
25 think -- again, this is just a matter of -- I believe that the

1 law enforcement officials that run the Department of Homeland
2 Security had made the judgment that the right way to get people
3 to come out, account for themselves, be accountable for their
4 work, be on the rolls, have the tax taken out of their income,
5 this is the judgment that this program is the one that would
6 most successfully on a proper scale to actually achieve the
7 efficiencies that come from having a program like this, I think
8 the judgment has been made that that's the way that the program
9 would best work.

10 THE COURT: Okay. And the population you're talking
11 about is greater than the population of 26 states?

12 MS. HARTNETT: So I'm not sure --

13 THE COURT: Four-and-a-half million people, fair
14 estimate?

15 MS. HARTNETT: That's the estimate under both DACA and
16 DAPA of who would be eligible to apply. Of course, not everyone
17 applies or receives it.

18 THE COURT: Okay. All right. Let me switch gears
19 because there's one other thing that I think was -- and again,
20 it may not have been new, but it was set forth different.

21 At one point in your motion, you suggest that I ought to
22 apply the injunction only to Texas?

23 MS. HARTNETT: Yes, Your Honor.

24 THE COURT: I mean, isn't that contrary to every
25 immigration argument that the government has ever made? I mean,

1 can you think of a case where the government has ever argued
2 that there ought to be special rules for states? I mean,
3 haven't they always argued that immigration ought to be uniform
4 across the board?

5 MS. HARTNETT: As a general matter, yes, Your Honor.
6 And I believe that would be the best way for this program to be
7 applied. On the other hand, there are examples that I -- I can
8 bring them to the Court's attention if it would be useful. I'm
9 not fully prepared to discuss them here. Where there are pilot
10 programs with certain states or localities in which the
11 immigration laws are applied differently. I think the point of
12 the case law in this area is that it's the federal
13 government's -- it's up to the federal government to determine
14 when and how that will be appropriate.

15 And so in this case like in other cases involving pilot
16 programs or places where the federal government has chosen to
17 have differential application of the law, I think the judgment
18 is the benefit of that would outweigh the -- any downside; and,
19 frankly, that it would at least accomplish some of the important
20 goals that the government is seeking to achieve.

21 THE COURT: Why not do it for the ten states that are in
22 favor of it, at least by amicus, and not do it for the 27 states
23 that are plaintiffs? We have a lawyer here from Indiana. He's
24 one of the plaintiffs. Why not do it for all 27 states?

25 MS. HARTNETT: Well, again, Your Honor, I appreciate the

1 question. I think our point of view is that the best way to do
2 the program and the way that the law enforcement officials at
3 the Department of Homeland Security believe was the best was to
4 do it on a nationwide basis. I think the reason why we argued
5 for limiting it to Texas in our motion for a stay was that the
6 evidence that came in at the preliminary injunction phase as
7 supported at most an injunction with respect to Texas. As to an
8 alternative program that would only be directed at states that
9 chose to be part of it, that certainly is another policy option,
10 but is not the one we're defending here because the law
11 enforcement officials chose a program that would apply
12 nationwide and deliver the highest benefit and national security
13 benefit from their perspective.

14 THE COURT: I'm shaking a little bit. I know you're not
15 from Texas, but the current slogan for the governor's tourism
16 office is, "It's like a whole other country." This would play
17 right into it. You might get his support for that.

18 Let me go back and seriously ask. I mean, doesn't the
19 constitution contemplate a uniform law, Article I of the
20 constitution?

21 MS. HARTNETT: Your Honor, as a general matter, yes.
22 But as I'm pointing out, there have been pilot programs and
23 other -- and other -- and other initiatives that are directed at
24 certain communities, and we would be happy to provide the Court
25 additional authority on that if you would find it useful.

1 THE COURT: All right.

2 MS. HARTNETT: But again, I'm just now back to the
3 discovery for one further point, is that we would not only seek
4 the ability to file a written opposition, which would provide
5 some of the legal analysis that we haven't covered here also,
6 but, you know, we also would want to maintain the ability to
7 object to any discovery requests that -- the specifics of any
8 discovery requests. Because as the Court may be aware, there
9 are some sensitivities of privilege and other things that were
10 implicated by what they -- what they said.

11 I guess one other -- not to dig my hole any further, but I
12 actually wanted to add one other. This didn't come out in the
13 questioning that you have here, but I also wanted to bring to
14 your attention one other thing. I had meant to kind of go
15 through the activities that the DHS officials took right after
16 your injunction to make you feel comfortable that we had been
17 immediately implementing them.

18 The secretary issued a directive on Tuesday, a statement
19 saying we would comply fully. The USCIS, head of USCIS also
20 issued an email to the field that day on the 17th saying that we
21 would have full compliance. The other two components also
22 issued emails to the field the next day because they have some,
23 as you know, interaction with the deferred action, even though
24 they don't principally run the program.

25 And there's been some talk in the news about facilities and

1 employment of people for gearing up for DAPA. All of that
2 ceased, and resources have been directed to other places. In
3 addition, there have been obviously all the forms and things
4 that were going to go up on the website on the 18th did not go
5 up. Things that had -- publicity that had been out there,
6 including existing websites had banners added to them to make
7 clear that the program was not taking effect.

8 And also I just would note with respect to the three year to
9 two year grants, immediately as of the 17th, that did cease.
10 The USCIS centers were told not to process any more three year
11 to two year grants, and that included -- there were about 750
12 that were in the pipeline that day that were about to go out the
13 door with the three year cards, and those were pulled back, and
14 so those were only issued as two year cards, even though some of
15 those people had gotten notice that they would get three years.

16 We have been consulting with our clients, determined there
17 were about 55 cards that have gone out as three year terms since
18 the Court's injunction. That those were a result of what
19 appears to be just manual error, having the three inserted in
20 the system rather than two. And the department has actually in
21 its system corrected those, and those are now two year grants of
22 deferred action, but those were not in any way -- those were --
23 is an error and contrary to the directive from the top of no
24 more three year cards as of February 17th.

25 THE COURT: I hope you notified the recipients of that.

1 MS. HARTNETT: We're in the process of taking full
2 corrective action, but I just wanted to bring that to the
3 Court's attention because again, we really had no -- no intent
4 and certainly no -- no intent to withhold any of this material
5 from the Court. It simply was not the focus of the harms that
6 were at the crux of the PI motion.

7 THE COURT: All right. Ms. Colmenero, you want to add
8 anything?

9 MS. COLMENERO: Sure. Just a couple of points, Your
10 Honor.

11 Just to clarify, our motion for early discovery is simply
12 asking the Court the ability to take -- to conduct some early
13 discovery. We're not asking for any specific form of remedial
14 relief. This is information that we have learned about that we
15 find surprising, we find concerning, and we would like to learn
16 some more information about it. And there is a mechanism to do
17 that, and that's through discovery. And Rule 26(d) allows for
18 parties to conduct early discovery when there is good cause.
19 And this situation here presents good cause in which to take
20 early discovery because clearly there was some confusion in
21 terms of what plaintiffs were challenging and what -- in terms
22 of the expanded DACA and the three year grants of deferred
23 action compared to the two year renewal grants.

24 I want to be clear that we disagree that the only -- that
25 the only harm that would have flowed would be to new DACA

1 applicants. There is irreparable harm that flows from the
2 issuance of the three year deferred action grants under the
3 expanded DACA program. And the reason is is that -- and we told
4 the Court that. On page 26 of our motion for preliminary
5 injunction, we specifically mentioned that an expansion of the
6 DACA program which would include the change from the two year
7 deferred action period to the three year deferred action period
8 would cause new waves of immigration in the plaintiff states and
9 in the country. And that was irreparable harm that we were
10 seeking to prevent with the preservation of the status quo. So
11 we have always been concerned about the harm by the expansion of
12 DACA as set forth in the 2014 DHS directive.

13 In terms of that there's not -- I just want to reiterate
14 that we don't -- we disagree with defendants that there is
15 not -- that there's really no distinction between two year
16 deferred action renewals and this expansion of DACA with the
17 three year grants. As we set forth in our argument earlier
18 today, there is irreparable harm that does flow from the states
19 from this -- these three year grants.

20 And in particular, it is the issuance of driver's licenses.
21 It is the new waves of immigration. It is an additional
22 incentive that it creates with individuals who may want to
23 immigrate here to the United States or want to apply for this
24 additional benefit.

25 THE COURT: Well, just as a matter of course here, let

1 me stop you.

2 MS. COLMENERO: Okay.

3 THE COURT: I mean, I basically ruled against you on the
4 new wave of immigration argument, didn't I?

5 MS. COLMENERO: Yes, Your Honor. But we do think
6 that -- and even though you ruled against us and we -- you know,
7 we support the preliminary injunction that Your Honor did, in
8 fact, issue, this is irreparable harm.

9 THE COURT: So you liked the part where I ruled for you,
10 and you didn't like the part where I ruled against you?

11 MS. COLMENERO: Well, this is a harm that the plaintiff
12 states continue to feel, and we do want to make that -- that --
13 we wanted to preserve that point with the Court. And that even
14 with this additional information, there is still irreparable
15 harm that just cannot be cured by changing these three year
16 grants to two year grants.

17 And I just want to conclude by saying, you know, we
18 understand that this is a big, complex federal program. And I
19 guess it's not surprising to us that there may have been less
20 than stellar communication between the on-the-ground folks and
21 the attorneys. But in light of the incomplete information that
22 has reached this Court and the plaintiffs so far, and in light
23 of the complex nature of this entire program, we need some
24 additional information, we need some documents, and not just the
25 words of a few attorneys from the Department of Justice in order

1 to detect and address at an early opportunity whether any
2 further implementation is occurring or further irreparable harm
3 is occurring.

4 And for that reason, Your Honor, we would request that this
5 Court grant our motion for early discovery.

6 THE COURT: Ms. Hartnett, anything you want to add?

7 MS. HARTNETT: Just about two quick points. Just to
8 the -- I wanted to briefly respond to the suggestion here for
9 the first time that the -- having the grants be three year sort
10 of incentivizes people to apply more. And just for the Court's
11 awareness, and we're happy to provide this more officially if
12 the Court would like it, of the 108,081 -- this is based on our
13 best -- obviously information that we have today. Of the
14 108,081 three year grants that occurred during this time period,
15 94,681 were applications that were submitted prior to the
16 November 20th memo. And so I don't think there's a basis,
17 although we could obviously provide that further in writing if
18 the Court would find it useful --

19 THE COURT: How did they -- how did they apply for a
20 three year grant --

21 MS. HARTNETT: They just applied --

22 THE COURT: -- before -- before the November 20th memo?
23 That's what created the three year grant.

24 MS. HARTNETT: Sorry to interrupt, Your Honor. Yes.
25 No, they just were applying for DACA under the 2012 criteria.

1 And then effective November 24th from the memorandum, those
2 became three year grants. So I just wanted to bring that fact
3 to the Court's attention.

4 And on the point about communication that the -- that the
5 other side alluded to regarding our relationship with our
6 client, all I would tell the Court again, as I said earlier, was
7 that we strove to provide the Court accurate information on all
8 issues of focus, and that was not an issue of focus. But I just
9 didn't want to let stand the notion that we wouldn't be able to
10 get accurate information from our client and provide it to the
11 Court if the Court needed that from us.

12 THE COURT: All right. All right. Thank you,
13 counselors. I'm going to rule on this and the other pending
14 motions promptly. I mean, obviously I've heard them. If
15 there's any remedial things that I order, we'll take care of
16 that here. And obviously during the pendency of that, the
17 appeal will go up, and you can discuss that, the merits with the
18 Fifth Circuit.

19 I don't see a need, Ms. Hartnett, unless you just want to
20 file a response to her motion, because you basically just argued
21 your response. Her motion for discovery. But if you want to
22 file it, you need to do it like in the next 48 hours.

23 MS. HARTNETT: Your Honor, we will do so just on the
24 good cause standard. There's some law we would like to provide
25 you as well.

1 THE COURT: All right. Because I don't think it's fair
2 to anybody to let this linger. It -- you know, I've given it my
3 best shot. It's time to let somebody else give it their best
4 shot.

5 All right. Thank you, counsel. We'll stand adjourned.

6 *(Court adjourned.)*

7 * * *

8 (End of requested transcript)

9 -oOo-

10 I certify that the foregoing is a correct transcript from
11 the record of proceedings in the above matter.

12
13 Date: March 19, 2015

14
15 /s/_____
16 Signature of Court Reporter
17 Barbara Barnard
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